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General Principles of Social Security Law: Security

The situation in the Netherlands

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Part I: Legislative aspects

1 State obligation to introduce and maintain social security

1.1 Social security as a fundamental social right

The right to social security was incorporated in the Dutch Constitution as part of the Constitutional amendment of 1983, which provided for the inclusion of a number of other fundamental social rights dealing with legal aid, employment, employees' rights, freedom of labour, environment, public health and education. The text of Article 20 is as follows:

1. De bestaanszekerheid der bevolking en spreiding van de welvaart zijn voorwerp van zorg van de overheid.
2. De wet stelt regels omtrent de aanspraken op sociale zekerheid.
3. Nederlanders, hier te lande, die niet in het bestaan kunnen voorzien, hebben een bij wet te regelen recht op bijstand van overheidswege

In translation:

1. It shall be the concern of the authorities to secure the means of subsistence of the population and to achieve the distribution of wealth.
2. Rules concerning entitlement to social security shall be laid down by Act of Parliament.
3. Dutch nationals resident in the Netherlands who are unable to provide for themselves shall have a right, to be regulated by Act of Parliament, to public assistance.

The inclusion of the fundamental social rights in the Constitution in 1983 was preceded by intense debate with regard to the need for and the effect of these rights. It must nevertheless be borne in mind that recognition of the right to social security was not a new phenomenon in the Dutch legal order. After all, the right is also enshrined in a number of international instruments by which the Netherlands is bound, such as the Universal Declaration of Human Rights (Art. 22; the right to social security), the International Covenant on Economic, Social and Cultural Rights (Art. 9; the right to social security, including social insurance) and the European Social Charter (Art. 12; ensuring the effective exercise of the right to social security).

Much has been written about the content and legal effect of Article 20 of the Constitution and other fundamental social rights. There is a wide range of opinions, some minimalist, some more generous. The minimum view is represented by Burkens, who associates fundamental social rights with 'amorphous policy guidelines whose legal effect roams in the dark'.¹ Another representative of this conservative viewpoint is Kortmann, who remarks in his handbook of constitutional law that fundamental social rights do not really constitute an element of the *rechtstaat* (a state based upon the principle of the rule of law).² In his view, this can only be the case when these rights contribute towards the

¹ Cited in a study of the Social and Economic Council, *Verantwoordelijkheidsverdeling sociale zekerheid*, Den Haag: SER 1994, p. 172.

² C.A.J.M Kortmann, *Constitutioneel recht*, Deventer, 1997, pp. 355-366.

realisation of fundamental freedoms. In a society where people are hungry the exercise of these freedoms may be endangered and in these circumstances social security programmes might be necessary. But even then, it can be questioned whether the state should be responsible for maintaining them. By preference, responsibility for such programmes should be borne by the community.

A proponent of the generous view of the effect of the right to social security is, for example, Vlemminx, who distinguishes between various types of state obligations under the headings of 'abstention', 'insurance', 'policy' and 'protection'.³ In his view, the formulation of some (international) fundamental social rights implies that individuals without resources should be entitled to concrete support.

In the jungle of opposing views on Article 20 of the Constitution it is only possible to distil consensus regarding what it does *not* include. Two aspects are worth mentioning. In the first place, Article 20 does not include a clear material concept of social security, let alone a standard for the level of the benefits. In other words, it does not say what social security is or what social security model should be adopted. Consequently, the only possible conclusion is that social security is what the majority of people think it is at a given point in time. Secondly, Article 20 does not prescribe a specific division of powers between the state, society at large and the individual. Though this observation is perhaps less true of the third paragraph, dealing with the right to social assistance, certainly the second paragraph sheds no light on the ideal division of powers. It has been argued that Article 20 rules out total state abstinence as regards social security, as if it excludes the possibility of a nineteenth century liberal state.⁴ This may be true, but the fact remains that the article does not contain any suggestion that the state should organise or administer social security itself. On the contrary, it is frequently suggested that it is not the state, but rather society as a whole that should take primary responsibility for this, as classic fundamental rights tend rather to restrict the possibility of state interference. From this point of view it is more plausible to interpret Article 20 as implying that the right to social security could also be implemented by means of contractual rights and obligations between citizens and private parties.⁵

In the light of the vagueness of Article 20, it is understandable that it has not served as a concrete point of reference for testing the legitimacy or constitutionality of measures in the field of social security. However this does not mean that Article 20 has been altogether without influence. In the mid-1990s the government introduced plans to replace the existing sickness benefits scheme by a scheme requiring employers to continue wage payments during periods of sickness (then for a maximum period of one year). The operation is often referred to as the privatisation of the *Ziektewet* (Sickness Benefits Act). In its official advice to the government, the Council of State urged the government to have regard to the principles of Article 20 of the Constitution. This was the first time that the fundamental right to social security was invoked to judge the validity of changes to the system. According to the Council of State the government had

³ F. Vlemminx, *Een nieuw profiel van grondrechten*, Deventer, 1998.

⁴ W.J.P.M. Fase, 'Sociale grondrechten in de grondwet', *NJCM-bulletin* 1983, pp. 208-211.

⁵ D. Pieters, *Sociale grondrechten op prestaties*, Antwerpen, 1985, pp. 448-449.

to make it clear how the privatisation proposals were capable of striking a balance between solidarity on the one hand and personal initiative and individual responsibility on the other. The government responded by proposing that a privatised social security system is not contrary to Article 20 as long as it operates within a legislative framework which is capable of inhibiting negative market forces and guarantees the rights of employees. The government referred to this as the ‘social conditioning’ of privatisation. The government formulated the following requirements on the basis of Article 20:

The obligation of all employees to insure themselves against the major social risks and the right of employers to take insurance against these risks, which should apply without selection and which should be affordable. The rights of employees in case of bankruptcy must be secured and extra attention should be paid to the position of chronically sick employees and small enterprises.⁶

In this way, the government inferred a duty from Article 20 to interfere in situations in which the market no longer satisfied the objectives of social security and was able to establish concrete criteria for it. In the end the sickness benefits scheme was kept as a safety net. Furthermore, the right to continued wage payments for workers was embedded in the Civil Code. In order to avoid adverse risk selection, employers are no longer allowed to conduct medical tests before hiring employees. A legislative and infrastructural framework, referred to as the ‘gatekeeper model’, has been set up to ensure that sick unemployed persons are rapidly reintegrated into the labour market instead of becoming dependant on long term invalidity benefit.⁷

Much debate is possible regarding the need for and necessity of the privatisation of the sickness benefits scheme, but the secondary measures which accompanied the operation have made it harder to argue that it was unconstitutional. Nonetheless the measures in the field of sickness benefits have attracted a good deal of criticism and suspicion from the supervisory committees of the European Social Charter, the European Code on Social Security and ILO Conventions. In 1998 the Committee of Independent Experts of the ESC concluded that the operation was contrary to Article 12(3) of the Charter, which obliges the state to progressively raise the levels of social protection.⁸ According to the Committee, privatisation undermines the principle of solidarity, as it does not allow for the spreading of risk. The Dutch government has actively tried to refute this point of view, to some extent successfully: instead of rejecting the privatisation measures out of hand, the supervisory authorities now phrase their criticism more carefully. The present position of both the European Committee for social rights and the ILO Committee of Experts⁹ is that, although the developments in the Netherlands are not necessarily contrary to fundamental standards, they should be monitored intensively in view of the incidence of possible negative side effects.¹⁰

⁶ *Kamerstukken II* 1995/96, 24 439, nr. 3, 5.

⁷ Cf. B. Barentsen and J.M. Fleuren-Van Walsum, *Wet verbetering poortwachter*, Deventer, 2002.

⁸ Committee of Independent Experts, observations 1992-1996. Council of Europe, 1998.

⁹ De last conclusions of the European Committee of social rights with regard to the Netherlands are contained in 2006, XVIII (1). For the conclusions of the ILO-Committee of Experts see CEACR, documentnummer 062003NLD102.

¹⁰ For a critical discussion see M.J.A.C. Driessen, ‘Privatisering van sociale zekerheid en internationaalrechtelijke grenzen’, in: S. Klosse (ed.), *Arbeid en Gezondheid. Schipperen tussen verantwoordelijkheid en bescherming*, Maastricht, 2006, pp.209-221.

1.2 Impact of international law

The fundamental right to social security as enshrined in international law has not attracted much attention in parliamentary discussions or in judicial decisions. With the completion of the national social security system the primary reference point for discussion and for the settlement of disputes was no longer the fundamental right to social security but rather the various acts of parliament. As far as the Dutch courts are concerned: they have always refrained from complex mind exercises regarding the possible implications of the fundamental right. It is still their opinion that the right to social security does not qualify as a self-executing provision within the meaning of the Dutch Constitution,¹¹ and in the Dutch constitutional context only these types of provision are capable of invalidating conflicting national legislation.¹²

Many contemporary scholarly essays argue in favour of a stronger role for fundamental social rights.¹³ It has been argued that the lack of attention given to the right to social security is undeserved as it fails to take into account a number of developments, such as:

- the collapse of consensus with regard to the ultimate rationale (*rechtsgrond*) of social security;
- the gradual dilution of the entitlement to benefit as an individual right, resulting from the growing importance of discretionary powers, in particular in social assistance legislation;
- the increasing international acknowledgement of the right to social security as a universal right.¹⁴

It remains to be seen whether the trend in legal thinking will be echoed by judicial decisions. There may be indirect signs that point in this direction. In general terms fundamental rights increasingly make themselves felt in social security case law.¹⁵ What is more, the highest court for social security matters, the *Centrale Raad van Beroep* (Central Appeals Court; CRvB) is increasingly showing a willingness to apply the

¹¹ For an overview of the relevant case law, see Frank Vlemminx, 'The Netherlands and the ICECR, why didst thou promise such a beautiful day' in: Fons Coomans (ed.), *Justiciability of economic and social rights: experiences from domestic systems*, Antwerpen/Oxford, 2006, 43-66.

¹² Art. 94 of the Constitution provides that 'Statutory regulations in force within the Kingdom shall not be applicable if such application is in conflict with provisions of treaties or of decisions by international organizations under public international law, which can bind everyone'.

¹³ Cf. Klara Boonstra, *Fundamenten voor een sociaal Europa*, oration Vrije Universiteit, 2003; Saskia Klosse, *Moderne sociale zekerheid: efficiency met behoud van fundamentele waarden*, oration Universiteit van Maastricht, 2003. The most outspoken rallying call for the right to social security is contained in G.J. Vonk, *Recht op sociale zekerheid, van identiteitscrisis naar hernieuwd zelfvertrouwen*, oration Groningen, 2008.

¹⁴ Cf. Gijsbert Vonk, 'An individual complaints procedure for fundamental socio economic rights, some remarks from the perspective of the right to social security in the Netherlands' *Griffin's View*, 2007, 93-99.

¹⁵ F.J.L. Pennings, *Monografieën Sociaal Recht, Nederlands Socialezekerheidsrecht in een internationale context*, Tilburg, Utrecht, Kluwer uitgave 2004; G.J. Vonk, *Overijverige rechter of tekortschietende wetgever, de rol van rechter en wetgever bij het proces van doorwerking van internationale normen in het socialezekerheidsrecht*, oration Vrije Universiteit, 1999.

minimum standards conventions of the ILO and the Council of Europe.¹⁶ For a long time the *Centrale Raad van Beroep* ruled that minimum standard conventions could not be relied upon in individual cases in view of their programmatic character and the vagueness of the rules. A change was announced in a judgment of 29 May 1996.¹⁷ This case concerned the question whether it was in line with ILO Conventions Nos. 102 and 103 to charge the insured persons a financial contribution for hospital maternity care. The Court ruled that:

The descriptions of the benefits to be paid, as well as the imperative wording of the provisions in relation to the minimal character of both the Convention in general and of these provisions in particular, mean that they are suitable to be invoked by the persons protected with a view to testing rights granted under national law against the standards of the Convention and therefore, within this meaning, one can speak of convention provisions that are self-executing as regards content within the meaning of Article 93 of the Dutch Constitution.

Imposing a financial contribution for hospital maternity care was held to be unlawful. As a matter of fact, at the time of the proceedings the government had abolished this kind of contribution anyway.

Since the maternity leave judgment, ILO Conventions have frequently been invoked, but to no avail. This led to the suggestion that the judgment was something of a red herring. But recently, in a case which again concerned the charging of a financial contribution (but this time for hospital care resulting from an industrial injury) the *Centrale Raad van Beroep* repeated its earlier judgment.¹⁸ The relevant provision of part VI of the European Code on Social Security was to be applied directly. The result was that the national legislation had to give way for the minimum standard involved. This time there were no government intentions to abolish the financial contribution spontaneously.

The change in attitudes towards international minimum standards on social security could possibly work as a lever with which to open the door to some form of applicability of the right to social security. However, as yet this door remains firmly bolted. In a recent, crucial test case involving the exclusion of illegal children from entitlement to emergency assistance under the *Wet werk en bijstand* (Work and Social Assistance Act; WWB), the *Centrale Raad van Beroep* sang the old song and bluntly stated that Article 27 of the International Convention on the Rights of the Child (adequate standard of living)¹⁹ is not a self-executing provision within the meaning of the Constitution.²⁰

¹⁶ The development of the relevant case law has been documented by Frans Pennings in his oration for Tilburg University in 2004. F.J.L. Pennings, *De betekenis van internationale normen voor de Nederlandse sociale zekerheid*, oration Tilburg University, 2004.

¹⁷ RSV 1998/9, annotation by F. Vlemminx.

¹⁸ CRvB 8 september 2006.

¹⁹ The right to social security adopted in Art. 26 ICRC could not be invoked in view of a Netherlands reservation made by this article.

²⁰ CRvB 24 januari 2006, RSV 2006, 84 annotation G.J. Vonk. The confirmation that Art. 27 ICRC is not self-executing came in CRvB 9 oktober 2006, RSV 2006, 369. For a critical analysis, see G.J. Vonk, 'Ongewenste kinderen; opmerkingen naar aanleiding van CRvB 24 januari 2006', *SMA* 2006, pp. 131-134.

2 The legal duty to respect the position of the individual

2.1 Constitutional protection of acquired rights and vested interests

The right to property is included in art. 14 of the Constitution. The text of this article reads:

1. Expropriation may take place only in the public interest and on prior assurance of full compensation, in accordance with regulations laid down by or pursuant to Act of Parliament.
2. Prior assurance of full compensation shall not be required if in an emergency immediate expropriation is called for.
3. In the cases laid down by or pursuant to Act of Parliament there shall be a right to full or partial compensation if in the public interest the competent authority destroys property or renders it unusable or restricts the exercise of the owner's rights to it.

Curiously, in Dutch legal doctrine and case law, the right to property is not associated with social security and changing benefit rights. In public law the protection of rights which the individual derives from the existing state of the law is much rather approached from the perspective of the principle of legal certainty (*rechtszekerheidsbeginsel*). The Constitution does not include an explicit reference to this principle. It merely contains a prohibition of legislation with retroactive effect in the area of criminal law. Thus article 16 of the Constitution prescribes that no offence shall be punishable unless it was an offence under the law at the time it was committed. In other areas than criminal law, the *Hoge Raad der Nederlanden* (the Supreme Court of the Netherlands; HR) has accepted the principle of legal certainty as an unwritten principle of law. This implies that the courts can test all legislation (except acts of parliament) and decisions of public authorities against this principle.²¹ Indeed, the Courts have a long-standing tradition in this respect.²² Since the beginning of the twentieth century, the principle of legal certainty has been invoked against subordinate legislation which adversely affects the vested interests of individuals. Similarly, these days the administrative courts, including the *Centrale Raad van Beroep*, do not hesitate to apply the principle of legal certainty.²³

Despite the above, the Dutch constitutional rule that acts of parliament are inviolable implies that courts may not call the validity of such acts into question, unless the acts are contrary to self-executing provisions of international law. This implies that the courts have no power to judge whether acts of parliament (as opposed to subordinate legislation) have infringed the principle of legal certainty. This was explicitly stressed by the *Hoge Raad* in a judgment in 1989,²⁴ in a case initiated against the Dutch state by the national student union following legislative changes that limited the possibilities for students to obtain grants. The changes blatantly violated students' expectations based on the old legislation and no provision was made for transitional arrangements to accommodate these expectations. In its judgment the *Hoge Raad* went out of its way to point out in what circumstances the principle of legal certainty might be relied upon by the courts, but

²¹ HR 16 mei 1986, NJ 1987, 251 (landbouwwliedersarrest).

²² CRvB 31 juni 1935, ARB 1936, 168.

²³ For an example, see CRvB 11 december 1980, AB 1981, 200 annotation by Van der Net (retro-active effect health cost regulation).

²⁴ Referred to as the *Harmonisatiewet* judgment, HR 14 april 1989, AB 1989, 207.

eventually reaffirmed that when it comes to the formal question of testing the validity of acts of parliament, the courts must remain silent.

This judgment was based on the assumption that the principle of legal certainty was not embedded in any international legal obligation. In retrospect, it may be questioned whether this assumption was correct. It could very well be argued that the principle of legal certainty constitutes an element of the right to property as referred to in Article 1 of the First Protocol of the European Convention of Human Rights (ECHR). Admittedly it is only since the judgment of the European Court of Human Rights in *Gaygusuz*²⁵ that it has become clear that Article 1 of the First Protocol may have these implications specifically for legislation in the area of social benefits. Indeed, the courts now fully accept the implications of Article 1 of the First Protocol for the protection of acquired rights and vested interests under the social security laws (see section 2.2 below). The *Gaygusuz* judgment has truly caused a change in Dutch legal theory.²⁶

2.2 Social security case law

Even though the courts may not constitutionally judge changes in acts of parliament in the light of the principle of legal certainty, the *Centrale Raad van Beroep* has circumvented this difficulty by approaching such cases from the viewpoint of non-discrimination. This road was opened after the *Centrale Raad van Beroep* decided in 1983 that Article 26 of the International Covenant on Civil and Political Rights has direct effect in the Dutch legal order, also in matters of social security.²⁷ The reasoning behind applying the non-discrimination principle is usually that there is a lack of objective justification for treating the existing rights of existing beneficiaries in the same way as the rights of persons who acquire benefits after legislative changes have been implemented. A good example of how the *Centrale Raad van Beroep* has applied this technique deals with the introduction of the so-called Linkage Act in 1998.²⁸ Under the Act, persons who are illegally resident in the Netherlands are no longer entitled to benefits. The Act was given immediate effect, so existing beneficiaries were also affected by it. In 2001, in a case concerning child benefit, the *Centrale Raad van Beroep* accepted that the Act did not constitute discrimination on grounds of nationality as it serves a justified purpose, namely preventing social security entitlement from having an encouraging effect on the stay of persons residing illegally in the Netherlands. However, the *Centrale Raad van Beroep* made an exception for those who were already receiving child benefit. According to the *Centrale Raad van Beroep*, the consequences of illegal residence for child benefit entitlement in the Netherlands had already materialised for this

²⁵ *Gaygusuz v Austria*, ECHR RJ&D 1996-IV, no. 14, 1129-1157.

²⁶ Cf. G.J. Vonk, 'Social security and the right to property: *Gaygusuz* and after', in: Jan Peter Loof, Hendrik Ploeger & Arine van der Steur (eds.), *The right to property, the Influence of Article 1 protocol No. 1 ECHR on several fields of domestic law*, E.M. Meijers Institute, Maastricht, 2000, pp. 145-155.

²⁷ CRvB, 1 november 1983, RSV 1984, 147 t/m 150, annotation by W M Levelt-Overmars.

²⁸ Stb. 1998, 2004.

group. In these circumstances, applying the linkage principle was no longer considered a suitable and proportionate instrument for realising the objectives of the Act.²⁹

Once the consequences of the *Gaygusuz* judgment had sunk in, the *Centrale Raad van Beroep* no longer fell back on the principle of non-discrimination when dealing with the quality of transitional arrangements accompanying legislative changes. Instead it has dealt with questions of acquired rights and vested interests directly under Article 1 of the First Protocol ECHR. This became apparent in a judgment of 18 June 2004³⁰ in which the *Centrale Raad van Beroep* ruled on the validity of an act that disentitled detainees from social security benefits. The act had entered into force on 1 May 2000. It disqualified not only future detainees from benefits, but also persons who were at that time already in detention (with an extension of rights for a period of only one month). The question of law was very similar to the one that arose in the Linkage Act case discussed above. The *Centrale Raad van Beroep* considered the extension period of one month to be too short, this time basing its argument on Article 1 of the First Protocol ECHR.

An important case dealing with changes in the legislative regime deals with the changes to the survivor benefit scheme of 1996. These changes, which included the introduction of a means test, were given immediate effect, albeit that some mitigation measures had been given more favourable treatment. Nonetheless, as a consequence of the introduction of the new *Algemene nabestaandenwet* (General Surviving Relatives Act; ANW), existing widowers could be confronted with a considerable loss of income. The *Centrale Raad van Beroep* found that the transitional regime was not contrary to Article 1 of the First Protocol ECHR. The European Court of Human Rights accepted this position in *Goudswaard-van der Lans*.³¹ The case concerned a widow whose survivor pension was substantially reduced on the ground that she was cohabiting with a man. Under the old legislation this was without consequences, but under the new legislation cohabitantes are treated in the same way as married couples. The European Court took into consideration the fact that provision had been made to ease the effects of the new legislation on persons in the situation of the applicant. It accepted that the introduction of the new legislation had had effects on the applicant's disposable income, but found that it did not place Contracting Parties under a positive obligation to support a given individual's chosen lifestyle out of funds which were entrusted to them as agents of the public weal.

A more comprehensive test under Article 1 of the First Protocol was applied by the *Centrale Raad van Beroep* more recently in [a](#) case dealing with changes in the unemployment benefit scheme in 2003.³² In this year the government abolished the so-

Met opmaak: Engels (V.S.)

²⁹ CRvB, 26 juni 2001, RSV 2001, 216, annotation by Francis Keunen. For a similar judgement in the area of social assistance: CRvB, 26 juni 2001, AB 2001, 277.

³⁰ CRvB 18 juni 2004, AB 2004, 296.

³¹ *Goudswaard-van der Lans v The Netherlands*, ECHR 22 September 2005, No. 75255/01, AB 2006, 1. The case has been critically discussed by Frans Pennings 'Eigendomsbescherming in de sociale zekerheid' in: M. Herweijer, G.J. Vonk & W.A. Zondag (eds.), *Sociale Zekerheid voor het oog van de meester, opstellen voor prof. mr. F.M. Noordam*, Deventer, 2006, 101-114.

³² CRvB 11 september 2007, 06/4760 WW, LJN: BB3760, RSV 2007/317, USZ 2007/312

called follow-up benefit which was part of the unemployment benefit scheme. The benefit was payable after expiration of the normal earnings related component of the unemployment benefit. The government was so much in a hurry to implement the changes in the scheme, that it did not want to await the formal entry into force of the new legislation. The abolition was made public by press announcement. In the subsequent legislative amendment the provisions dealing with the follow-up benefit were abolished. Simultaneously a transitional provision was introduced which allowed employees to remain entitled to follow-up benefit as far as they had become unemployed prior to the date of the government press announcement. According to the *Centrale Raad van Beroep* the operation did not violate Article 1 of the First Protocol. In particular the Court ruled that the interference with the right to property served a legitimate course, i.e. budgetary considerations in combination with the wish to improve the activating character of the unemployment benefit scheme. In view of the wide margin of appreciation of the state, the measure was deemed not to be disproportional. The fact that the legislative change was given retroactive effect did not alter the situation. According to the Court there were three reasons for this. In the first place, the change did not merely affect a small number of employees as was the case in the famous *Ásmundsson* judgement of the ECHR which involved a very small group of beneficiaries who were adversely affected by government measure.³³ In the second place the Court attached relevance to the fact that the transitional regime was intended to avoid calculative behaviour on the part of the employers and employees. And finally, the Court took into account that the government had timely informed all employees of its intention to abolish the follow-up benefit. Under these circumstances the measure did not impose a disproportionate burden on the person involved.

It must be concluded that, under the influence of the European Court of Human Rights, Dutch courts are gradually embracing the right to property as a means of protecting acquired rights and vested interests. Case law is rapidly gaining maturity. Nonetheless, the state of the law is still a far cry from that in some other European countries, notably Germany, where the *Bundesverfassungsgericht* has a long tradition of applying the constitutionally enshrined principle of peaceful enjoyment of property in the field of social security benefits.

3 Legal changes and transitional measures

3.1 Theoretical framework

The question as to what transitional arrangements should accompany legislative changes has been a subject of legal and political debate ever since major restructuring measures were introduced in the second half of the 1980s. Before this, no major cases can be reported in which the interests of insured persons or beneficiaries were affected, except to their advantage. However, since the Dutch reform process has focused on downscaling levels of protection, existing beneficiaries have frequently suffered disadvantage. The extent to which changes can impair the interests of existing beneficiaries became apparent when the Dutch legislature had to apply the principle of equality of treatment to

³³ ECRM 12 October 2004, zaak 60669/00 (*Ásmundsson*).

the *Algemene Arbeidsongeschiktheidswet* (General Disability Insurance Act; AAW) in the wake of the Third Equal Treatment Directive (79/7/EC). Married women were excluded from the scheme unless they were regarded as breadwinners. When this exclusion was abolished in 1985,³⁴ a new condition was introduced requiring persons to have earned a certain amount of income in the year before the incapacity for work occurred. Initially, the government had made the inclusion of married women in the new income requirement applicable to new cases only. But after the *Centrale Raad van Beroep* had ruled in 1988 that this was contrary to the principle of equal treatment, new transitional measures had to be put into force. These made the income requirement applicable to existing beneficiaries as well, resulting in tens of thousands of persons losing their benefit entitlement. The transitional measures in the new AAW gave rise to a constant stream of legal complaints, some of which carried on right into the 1990s. Eventually the entire scheme was abolished, the only remnant being a non-contributory scheme for handicapped young persons (Wajong). Equality of treatment came at a high price.

In 1995, an independent research foundation published a book on transitional law in the field of social security.³⁵ The book, written under the chairmanship of the Groningen Professor F.M. Noordam, included contributions from a number of academics and judges, dealing with theoretical foundations, specific questions, case studies, etc. It has often been referred to in official publications as an authoritative source. In its general conclusions the publication argued that while the legislature can resort to various transitional measures, the basic principle should be to respect the rights of existing beneficiaries. It was argued that this followed from the very nature of social security, which is supposed to give citizens a secure material position. A choice has to be made between respecting the rights of existing beneficiaries fully (*eerbiedigende werking*) and postponing negative effects for a period of time, allowing beneficiaries to adjust to the new situation (*uitgestelde werking*). In the authors' view, the latter is generally preferable.

The SCOSZ publication challenged the official government view on transitional law in the social security field, which had been presented in a government statement to the *Eerste Kamer* (the upper house of parliament) on 29 March 1993.³⁶ In the statement the then social affairs minister had concluded that it was not possible to formulate a single simple rule for transitional law in the social security field, as each case should be considered on its own merits. The upper house and the Council of State were not satisfied with this view and requested the government to formulate a set of general rules. The response to this request was adopted in a letter to the upper house dated 19 November 1999.³⁷ The government refused to abandon its position:

Transitional law, even in the area of social insurance should be tailored. In each case the transitional regime to be applied should be carefully considered and reasoned. The choice of

³⁴ CRvB 5 januari 1988, RSV 1988, 104.

³⁵ SCOSZ, *Sociale-zekerheidsrecht en overgangsrecht*, Deventer, 1995.

³⁶ Notitie inzake overgangsrecht bij wijzigingen in sociale verzekeringswetten; *Kamerstukken I* 1992/93, 22 011, 46i).

³⁷ *Kamerstukken I* 1999/2000, 25 900, 87.

transitional measures depends on the nature of the social security legislation involved, on the objectives of the amendment (for example preventing abuse of rights, cutting down expense, increasing control), on the balance of the principle of legitimate expectations and the wish to apply changes equally to all groups, on the administrative possibilities, and the general perception of fairness. Financial and economic circumstances also play a role in the policy considerations. Transitional law should not be governed solely by legal considerations but also by policy. It is therefore not possible to develop mathematically applicable guidelines that create a solution for each specific case.³⁸

The upper house, still not satisfied with the answer, then produced its own set of criteria for transitional arrangements in social security. In the end, the government had to back down and on 18 April 2000 it formally presented the *Toetsingskader overgangsrecht social zekerheid*,³⁹ which includes a list of criteria to be taken into account when changing social security law. These criteria are grouped under the headings of:

- The nature of the social security scheme involved
- The nature and object of the changes
- The group affected by the changes
- Administrative considerations and enforceability

The *Toetsingskader* shows a (mild) preference for postponing the effect of changes, as originally suggested in the SCOSZ's publication. The statement submits that a step-by-step adjustment of existing benefit rights offers a good compromise between immediate effect and fully respecting existing rights. Nonetheless, in some cases it is better to allow changes to enter into force at a later date for the entire group of beneficiaries. This is because it leads to uniform application of the law, legal practice is given time to adjust to the new situation, while at the same time legitimate expectations are not violated. The preference for postponed effect also applies to long term social insurance benefits when these operate on the basis of accrued rights, as differences between old and new cases should not be prolonged excessively.

The legislative guidelines (*Aanwijzingen voor de regelgeving*),⁴⁰ an official publication that is to be taken into account by legislative authorities, explicitly refers to the *Toetsingskader*.⁴¹

3.2 Transitional social security law in practice

In practice transitional measures in the field of social security are as differentiated as the original government position suggested. All possible approaches are adopted, sometimes even within the framework of a single legislative change: tailored solutions indeed. While it is true that most of the transitional measures are based upon the notion of postponed effect, there have also been different approaches. Thus in the unemployment benefit case

³⁸ Ibid, page 7.

³⁹ *Kamerstukken I 1999/2000 25 900*, 87b.

⁴⁰ Circular from the Minister President of 18 November 1992, as amended: Stcrt 2005, 87.

⁴¹ Cf. Guideline no. 165.

discussed in paragraph 2.2 the abolition of the follow-up benefit (a flat rate benefit payable after the expiration of earnings related unemployment benefit) was given effect from the date the measure was officially announced, three months before the measure actually reached the statute book. In other words the measure applied to all persons who became unemployed after the date of the announcement. The government resorted to this tactic because it feared that a more lenient approach would lead to an avalanche of benefit claims prior to the date the measure entered into force. Conversely, replacement of the old *Wet op de arbeidsongeschiktheidsverzekering* (Disablement Benefits Act; WAO) by the *Wet werk en inkomen naar arbeidsvermogen* (Work and Income according to Labour Capacity Act; WIA) in 2006 fully respected the rights of the existing beneficiaries under the previous legislation. The introduction of the WIA was a major and controversial operation. Doubtless, respecting the rights of existing beneficiaries made the change more palatable for parliament and the groups it represents. This only goes to show that transitional social security law in the Netherlands is not only tailored, but pragmatic and, not least, political.

4 Executive branch regulations

It could be said that the preceding sections apply equally to government legislation and regulations, whether enacted on the basis of delegated powers or on the basis of discretionary powers. The latter category of rules (based on discretionary powers) are referred to as policy regulations (*beleidsregels*) and once officially published they enjoy a similar status to subordinate legislation.⁴² The *Centrale Raad van Beroep*, for example, has applied the legal certainty test to policy regulations, so that they may not be applied with retroactive effect.⁴³

⁴² Art. 4:81 Awb.

⁴³ CRvB 6 november 2002, RSV 2003, 57.

